PRIVY COUNCIL REPORT

BANK NEGARA INDONESIA 1946 v. LARIZA (SINGAPORE) PRIVATE LIMITED

[P.C. (Lord Brandon of Oakbrook, Lord Ackner, Lord Oliver of Aylmerton, Sir John Stephenson & Sir Edward Eveleigh) November 9 & December 14, 1987]

Commodities and Futures Trading – Contract – Agreement to pay by means of transferable irrevocable sight letter of credit – Application to bank to effect transfer – Refusal of bank – Uniform Customs and Practice for Documentary Credits (1974 Revision), art. 46(a) and (b).

Banking Law – Letter of credit – Transferable and irrevocable sight letter of credit – Construction of art. 46(a) and (b) of Uniform Customs and Practice for Documentary Credits (1974 Revision) – Need for expert evidence on relevant banking practice.

The respondents were dealers in commodities, including palm oil. By two agreements dated January 30 and February 15, 1980, they agreed to sell to Bakrie and Brothers (Singapore) Pte. Ltd. (Bakrie) 3,000 metric tonnes and 2,000 metric tonnes of crude palm oil in bulk unbleached at the prices of US$627 and US$670 per metric tonne respectively. It was a term of both agreements that payment for the palm oil was to be made by means of a transferable irrevocable sight letter of credit to be opened in favour of the respondents, the opening of which was to be advised through the Bank of Canton Ltd. In order to fulfil and perform the two agreements made by them with Bakrie, the respondents entered into two agreements with Ban Lee Oil Mill Co. (Singapore) Pte. Ltd. (Ban Lee) for the purchase of two corresponding quantities of crude palm oil in bulk of the same quality at the lower prices of US$601 and US$645 per metric tonne respectively. Payment under these two agreements was to be made by an irrevocable sight letter of credit to be opened in favour of Ban Lee.

On February 20, 1980 the respondents were advised by Bank of Canton that a transferable irrevocable letter of credit for US$3,315,050 had been opened by the appellants in favour of the respondents for the account of Bakrie. At first, the letter of credit was found to be unacceptable but, subsequently, multiple amendments were made to it. The respondents then requested the appellants to transfer part of the letter of credit to Ban Lee but the appellants suggested that the transfer should be effected by the Bank of Canton who were the respondents' bankers.

Bank of Canton declined to effect the transfer on the ground, *inter alia*, that the letter of credit was badly drafted and also that they were merely the advising bank without any engagement on their part. The respondents therefore reverted to their request to the appellants for the transfer but the appellants persisted in their refusal to effect it. In the result, the respondents failed to perform their obligations to Ban Lee and were sued by Ban Lee for damages for breach of contract and judgment was entered against the respondents for damages for breach of contract arising from the issuing and opening by the appellants of the letters of credit and a declaration that the respondents were entitled to be indemnified by the appellants in respect of the amount which might be awarded to Ban Lee, whether by way of damages, interest or costs, together with the respondents' costs of defending the action instituted by Ban Lee. The claim was resisted by the appellants who contended that they were not under any obligation to effect the transfer of the letter of credit as requested by the respondents. The action was dismissed in the High Court by Lai Kew Chai J. (see [1985] 2 M.L.J. 81) but the Court of Appeal unanimously reversed his decision and gave judgment for the respondents on their claim (see [1986] 1 M.L.J. 287).

The appellants appealed. It was contended (1) that on the true construction of article 46 of the Uniform Customs and Practice for Documentary Credits (UCP) they did not contemplate and were not concerned with the transfer of credit by the issuing bank. They only contemplated and were only concerned with the transfer of a credit by other banks, such as the confirming bank (if any), the advising bank or any other bank authorized and willing to pay, accept or negotiate under the letter of credit. It followed that the respondents were not entitled under article 46 to require the appellants to transfer the credit at all. This contention necessarily involved the proposition that neither the expression "the bank called upon to effect payment or acceptance" in paragraph (a) of article 46 nor the expression "the bank requested to effect the transfer in paragraph (b)" included the issuing bank; (2) if the first contention was wrong and both the expressions referred to included the issuing bank, then that bank, like any other, was by virtue of paragraph (b) under no obligation to effect a transfer except to the extent and in the manner expressly consented to by it.

In the present case, the appellants had not expressly consented to either the extent or the manner of the particular transfer requested by the respondents; further the appellants could not be taken, simply by designating the letter of credit issued by them as transferable, to have given such consent in advance, as held by the Court of Appeal.

Held: (1) support for the appellants' first contention is to be found in the terms of paragraphs (b) and (f) of article 46 of the UCP, but it would be unsafe to form a concluded opinion in favour of such contention without the assistance of expert evidence on relevant banking practice. No such evidence was placed before the trial judge. In the circumstances, the best course to take is to assume, without deciding, that the appellants' first contention fails and to examine their second contention on that assumption;

(2) with great respect to the Court of Appeal, their Lordships are unable to agree with their construction of paragraph (b) of article 46 that where the request was made to the issuing bank, that bank must, by reason of its having designated the credit as transferable, be taken to have consented in advance to such request. The request contemplated by paragraph (b) is a request to transfer the credit to a particular extent and in a particular manner. The consent contemplated by paragraph (b) is a consent to effect the transfer to that particular extent and in that particular manner. Such a consent cannot be given in blanket form in advance so as to apply to any request for transfer which may subsequently be made, whatever its extent or manner may be. It has to be an express consent made after request and it has to cover both the extent and manner of the transfer requested;

(3) the appeal will therefore be allowed and the order of the Court of Appeal set aside and the order of the High Court restored. The cross-appeal of the respondents in regard to the interest on damages should also be dismissed.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Anthony Boswood Q.C. (*Elizabeth Choo* with him) for the appellants.

Richard Field Q.C. (*Philip Sales* with him) for the respondents.

Cur. Adv. Vult.

Lord Brandon of Oakbrook (delivering the judgment of the Board): This is an appeal from an order of the Court of Appeal of Singapore (Wee Chong Jin C.J., Chua and Thean JJ.) dated November 6, 1985 allowing, with costs, an appeal from an order of the High Court of Singapore (Lai Kew Chai J.) dated May 16, 1984.

The material facts, as set out in the judgment of the Court of Appeal, are these. The respondents are dealers in commodities, including palm oil. By two agreements dated January 30 and February 15, 1980, they agreed to sell to Bakrie and Brothers (Singapore) Pte. Ltd. ("Bakrie") 3,000 metric tonnes and 2,000 metric tonnes of crude palm oil in bulk unbleached at the prices of US$627 and US$670 per metric tonne respectively. It was a term of both agreements that payment for the palm oil was to be made by means of a transferable irrevocable sight letter of credit to be opened in favour of the respondents, the opening of which was to be advised through the Bank of Canton Ltd. ("Bank of Canton"). In order to fulfil and perform the two agreements made by them with Bakrie, the respondents entered into two agreements with Ban Lee Oil Mill Company (Singapore) Pte. Ltd. ("Ban Lee") for the purchase from Ban Lee of two corresponding quantities of crude palm oil in bulk of the same quality at the lower prices of US$601 and US$645 per metric tonne respectively. Similarly, under these two agreements, payment was to be made by an irrevocable sight letter of credit to be opened in favour of Ban Lee.

On February 20, 1980, the respondents were advised by Bank of Canton that a transferable irrevocable sight letter of credit No. SIN/042/80 dated February 19, 1980 for US$3,315,050 ("the letter of credit") had been opened by the appellants in favour of the respondents for the account of Bakrie. At first, the letter of credit was found to be unacceptable as it was not in accordance with the agreements made between the respondents and Bakrie. However, subsequently multiple amendments were made to the letter of credit as required by the respondents. The respondents then requested the appellants to transfer part of the letter of credit to Ban Lee, but the appellants suggested that the transfer should be effected by Bank of Canton who were the respondents' bankers. Bank of Canton declined to effect the transfer on the ground, *inter alia*, that the letter of credit was badly drafted and also that they were merely the advising bank without any engagement on their part. The respondents therefore reverted to their request to the appellants for the transfer but the appellants persisted in their refusal to effect it. In the result, the respondents failed to perform their obligations under the agreements made with Ban Lee, and were sued by Ban Lee for damages for breach of contract and judgment was entered against the respondents for damages to be assessed. In the meanwhile, Bakrie had become insolvent and went into liquidation.

On December 8, 1982, the respondents commenced an action against the appellants in the High Court, claiming damages for breach of contract arising from the issuing and opening by the appellants of the letter of credit and a declaration that the respondents were entitled to be indemnified by the appellants in respect of the amount which might be awarded to Ban Lee, whether by way of damages, interest or costs, together with the respondents' costs of defending the action instituted by Ban Lee. The claim was resisted by the appellants who contended that they were not under any obligation to effect the transfer of the letter of credit as requested by the respondents.

Lai Kew Chai J., sitting in the High Court, dismissed the respondents' action with costs, but the Court of Appeal unanimously reversed his decision and gave judgment for the respondents on their claim.

The letter of credit issued by the appellants began:

"We hereby establish divisible and transferable irrevocable letter of credit ... in favour of Lariza (S) Private Ltd. ... on account of Bakrie and Brothers (Singapore) Pte. Ltd. ... for US$3,315,050.00 ..."

The letter of credit ended:

"We hereby agree with drawers, endorsers and *bona fide* holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honoured on

due presentation. This credit is subject to Uniform Customs and Practice for Documentary Credit (1974 Revision) International Chamber of Commerce Publication No. 290."

The Uniform Customs and Practice for Documentary Credits (1974 Revision) ("the UCP"), so incorporated into the letter of credit, provide so far as material:

"General provisions and definitions

(a) These provisions are definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

(b) For the purposes of such provisions, definitions and articles the expressions 'documentary credit(s)' and 'credit(s)' used therein mean any arrangement, however named or described, whereby a bank (the issuing bank) acting at the request and in accordance with the instructions of a customer (the applicant for the credit),

(i) is to make payment to or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or

(ii) authorize such payments to be made, or such drafts to be paid, accepted or negotiated by another bank,

against stipulated documents, provided that the terms and conditions of the credit are complied with. ...

(c) ...

(d) ...

(e) ... A bank is authorized to pay or accept under a credit by being specifically nominated in the credit.

A bank is authorized to negotiate under a credit either

(i) by being specifically nominated in the credit, or

(ii) by the credit being freely negotiable by any bank.

(f) ...

E. Transfer

Article 46

(a) A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

(b) The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges in respect of transfer are paid.

(c) ...

(d) A credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank ...

(e) ...

(f) The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on first demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

(g) ..."

Lai Kew Chai J. gave judgment on May 16, 1984. After reciting the facts, he said:

"In my judgment, the plaintiffs have no cause of action against the defendants as the issuing bankers of the letter of credit. A transfer of the letter of credit, as must be well known, involves a new contract between a bank and the intended transferee of the letter of credit. A separate letter of credit in favour of the transferee has to be issued. No contractual commitment on the part of the defendants having been made, the plaintiffs should have made their own contractual arrangements with their own bankers, usually the notifying bank, such as the Bank of Canton. An issuing bank of the letter of credit has no obligation whatsoever to enter into a new contract with an intended transferee. The defendants as the issuing bank only had the obligation to pay against conforming documents which were never tendered."

For the reasons there given, the judge dismissed the claim of the plaintiffs (the respondents in this appeal) with costs. It is to be observed that the judge reached his conclusion without any expert evidence of relevant banking practice having been adduced before him. It is further to be observed that he did not anywhere in his judgment make any express reference to the UCP.

The judgment of the Court of Appeal was delivered by Thean J. on November 6, 1985. He began by saying:

"This appeal turns on the true construction of paragraphs (a) and (b) of article 46 of the Uniform Customs and Practice for Documentary Credits (1974 Revision)."

Then, after reciting the facts in the manner set out earlier and referring to the decision of Lai Kew Chai J. in the High Court, Thean J. continued:

"It is not in dispute that upon the opening of the letter of credit there arose a contract between the appellants and the respondents whereby the respondents were obliged to pay to the appellants drafts drawn under the letter of credit upon the latter tendering the requisite documents in conformity with the terms thereof. The issue between the parties is whether, as the letter of credit is expressly designated as transferable, the respondents were obliged to effect the transfer of the credit as requested by the appellants. Nowadays, almost invariably, all letters of credit issued by banks are expressed to be subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision) of the International Chamber of Commerce ("the Uniform Customs"), and the letter of credit in the instant case is no exception. The question of transfer of credit is governed by article 46 of the Uniform Customs ..."

Thean J. then proceeded to set out the provisions of paragraphs (a), (b), (d) and (e) (but not (f)) of article 46. Having done so he went on:

"It is abundantly clear that paragraph (a) of article 46 confers a right on a beneficiary of a transferable irrevocable letter of credit, such as the appellants, to request 'the bank called upon to effect payment or acceptance' or 'any bank entitled to effect negotiation of the letter of credit' to transfer the credit in whole or in part to one or more third parties nominated by the beneficiary. As a corollary, there arises from this provision an obligation on the part of the bank so requested to effect the transfer. The respondents are the issuing bank of the letter of credit and are a bank 'called upon to effect payment or acceptance', and they had been requested by the appellants to effect a transfer of the letter of credit in part to Ban Lee. On the basis of paragraph (a) alone the respondents would be obliged to effect the transfer. However, the respondents rely on paragraph (b) of article 46 and contend that they are under no obligation to comply with the appellants' request, as paragraph (b) says that 'the bank requested, whether it has confirmed the credit or not, shall be under no obligation to effect the transfer except to the extent or in the manner expressly consented to by such bank and until such bank's charges in respect of the transfer are paid'. This argument, in our judgment, is unsustainable. Paragraph (b) by its express terms does not absolve the bank in all circumstances from the obligation to effect a transfer; the bank is obliged to effect a transfer where it has consented to do so. In the instant case, the respondents had issued an irrevocable letter of credit and had designated it as transferable; that being so it must be taken to have consented to a transfer of the letter of credit in accordance with the terms thereof. If it has not so consented, then it should not have designated the letter of credit as transferable. It makes no commercial sense for a bank to have opened an irrevocable letter of credit in favour of a beneficiary and designated it as transferable and thereafter, while the letter of credit remains in force, to say to the beneficiary, when requested to effect the transfer thereof, that it is not obliged to effect the transfer because it has not consented to do so."

On these grounds, the Court of Appeal allowed the appeal, set aside the judgment of the High Court and made an order in terms of a draft order as agreed between the parties. The main effect of that order was to award to the appellants in the Court of Appeal (the respondents here) the damages and indemnity which they had claimed.

Before the Board, two contentions were advanced on behalf of the appellants. The first contention was that, on the true construction of article 46 of the UCP, they did not contemplate, and were not concerned with, the transfer of a credit by the issuing bank. They only contemplated, and were only concerned with, the transfer of a credit by other banks, such as the confirming bank (if any), the advising bank or any other bank authorized and willing to pay, accept or neogtiate under the letter of credit. It followed that the respondents were not entitled under article 46 to require the appellants to transfer the credit at all. This contention necessarily involved the proposition that neither the expression "the bank called upon to effect payment or acceptance" in paragraph (a) of article 46, nor the expression "the bank requested to effect the transfer" in paragraph (b), included the issuing bank. The second contention was that, if the first contention was wrong, and both the expressions referred to included the issuing bank, then that bank, like any other, was by virtue of paragraph (b) under no obligation to effect a transfer except to the extent and in the manner expressly consented to by it. In the present case, the appellants had not expressly consented to either the extent or the manner of the particular transfer requested by the respondents; further the appellants could not be taken, simply by designating the letter of credit issued by them as transferable, to have given such consent in advance, as held by the Court of Appeal.

The appellants' first contention appears to have been accepted by Lai Kew Chew J. in the High Court, although, as mentioned earlier, he made no express reference to the UCP in his judgment. The Court of Appeal on the other hand appears to have proceeded on the basis, without any discussion of the question, that the first contention was wrong, and that both the expression "the bank called upon to effect payment or acceptance" in paragraph (a) of article 46, and the expression " the bank requested to effect the transfer" in paragraph (b), included the issuing bank.

In their Lordships' view, support for the appellants' first contention is to be found in the terms of paragraphs (b) and (f) of article 46. In paragraph (b) the expression "the bank requested to effect

the transfer" is followed by the expression "whether it has confirmed the credit or not". It is arguable from this that the banks included in the expression "the bank requested to effect the transfer" are banks which are capable of being confirming banks and no others. This would necessarily exclude the issuing bank. In paragraph (f) of article 46 the procedures specified can only apply in a case where the issuing bank on the one hand, and the paying, accepting or negotiating bank on the other hand, are different banks. From this also, it is arguable that a transfer by the issuing bank is not contemplated.

However, while these points in support of the appellants' first contention can legitimately be made, their Lordships consider that it would be unsafe for them to form a concluded opinion in favour of such contention without the assistance of expert evidence on relevant banking practice. As their Lordships indicated earlier, no such evidence was adduced before the trial judge. In these circumstances, their Lordships consider that the best course for them to take is to assume, without deciding, that the appellants' first contention fails, and to examine their second contention on that assumption. For that purpose, it is necessary to treat both the expression "the bank called on to effect payment" in paragraph (a) of article 46, and the expression "the bank requested to effect the transfer" in paragraph (b), as including the issuing bank.

The appellants' second contention raises a difficult question of construction of paragraphs (a) and (b) of article 46 by reason of the apparent conflict between them. Paragraph (a), by its express terms, confers on the beneficiary under a transferable letter of credit a right to instruct either the bank called upon to effect payment or acceptance, or any bank entitled to effect negotiation, to make the credit available in whole or in part to one or more third parties, described as second beneficiaries. If paragraph (a) stood alone it might be expected that the right of the beneficiary to instruct a bank to effect a transfer would carry with it, by implication, a right to compliance by the bank with the instruction. Paragraph (a), however, does not stand alone, but is followed immediately by paragraph (b), in conjunction with which it has to be read. Paragraph (b) provides, in the clearest possible way, that, where a bank is requested to effect a transfer, it is under no obligation to do so "except to the extent and in the manner expressly consented to by such bank". In their Lordships' view, these words negative what might otherwise be implied in paragraph (a) if it stood alone.

The Court of Appeal appears to have accepted that the consent referred to in paragraph (b) was in all cases necessary before a bank requested to effect a transfer became obliged to do so. They held, however, that where the request to transfer was made to the issuing bank, that bank must, by reason of its having designated the credit as transferable, be taken to have consented in advance to such request. With great respect to the Court of Appeal, their Lordships are unable to agree with this construction of paragraphs (a) and (b) for the following reasons. The request contemplated by paragraph (b) is a request to transfer the credit to a particular extent and in a particular manner. The consent contemplated by paragraph (b) is a consent to effect the transfer to that particular extent and in that particular manner. Such a consent cannot be given in blanket form in advance, so as to apply to any request for transfer which may subsequently be made, whatever its extent or manner may be. It has to be an express consent made after the request and it has to cover both the extent and the manner of the transfer requested.

The Court of Appeal was concerned that, unless the beneficiary had not only a right to instruct the issuing bank to effect a transfer, but also a right to have his instructions complied with, the whole purpose of his having a transferable letter of credit could readily be defeated. That may be so, although, without expert evidence on the relevant banking practice, it is not possible to estimate the likelihood of this happening at all frequently. Whatever the commercial difficulties may be, however, their Lordships have no doubt that the construction put upon paragraphs (a) and (b) of article 46 by the Court of Appeal cannot be supported. Their Lordships accordingly accept the appellants' second contention.

For the reasons which their Lordships have given, the appeal will be allowed, the order of the Court of Appeal dated Novermber 6, 1985 will be set aside and the order of the High Court dated May 16, 1984 will be restored.

There is also before their Lordships a cross-appeal by the respondents, raising questions as to the date from which, and the rate at which, they were entitled to recover interest on the damages which the Court of Appeal awarded to them. In view of their Lordships' decision on the appeal,

these questions have become academic and the cross-appeal must be dismissed on that account.

With regard to costs, the respondents must pay to the appellants their costs of the appeal to this Board and in the Court of Appeal. Having regard to all the circumstances, their Lordships make no order as to the costs of the cross-appeal.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Chyde & Co.*

SINGAPORE REPORTS

THE "SUHAILI 5201" SING KOON SENG SHIPBUILDING & ENGINEERING PTE. LTD. v. THE "SUHAILI 5201" (OWNERS AND OTHER PERSONS INTERESTED IN)

[C.A. (Wee Chong Jin C.J., Sinnathuray & Thean JJ.) October 9, 1987]

[Singapore – Civil Appeal No. 81 of 1986]

Shipping – Claim against owners and others interested in ship – Arrest of ship – Amendments of claim by plaintiffs – Security for release – Plaintiffs insist on payment of money into court – Offer of bank guarantee by defendants – Whether court has jurisdiction to cancel or vary guarantee – Amount of security.

The main issue in this appeal is whether the guarantee provided by the respondents (defendants in the High Court) in the sum of $1,584,530.74 for the release of the vessel "Suhaili 5201" arrested by the appellants should be cancelled or otherwise varied. The facts, complicated by the amendments made to the statement of claim by the appellants (plaintiffs in the High Court), are as follows. On July 1, 1986, the appellants commenced these proceedings against the respondents, claiming a declaration that they were entitled to their possessory lien of the "Suhaili 5201" (which they subsequently abandoned) and the sum of $1,048,511.77 in respect of modification carried out to the vessel at the respondents' request. The appellants arrested the vessel on the same day. For the release of the vessel, the respondents offered a bank guarantee of $1,584,530.74 but the appellants insisted on payment of the money into court. On July 11, 1986, the respondents obtained an order of court for the release of the "Suhaili 5201" upon furnishing a bank guarantee for $1,584,530.74, which they did on July 17, 1986, whereupon the vessel was released the following day. On July 21, 1986, the appellants filed their statement of claim in which they reduced their claim from $1,048,511.77 in the general indorsement to $1,000,358.62, which was later increased to $1,050,358.62 in their amended statement of claim.

In the High Court, counsel for the appellants argued that the court had no jurisdiction to reduce or cancel the guarantee as it amounted to a private arrangement. Counsel informed the court that the figures in the amended statement of claim were wrong and that the appellants were reducing their claim from $1,050,358.62 to $669,552.30, being the outstanding balance due to them from the respondents for work done on two ships, the "Suhaili 5201" and the "Sirocco." The learned judge held that the court had jurisdiction to vary the amount of the guarantee. He deducted the total sum of $686,558.23 which exceeded the appellants' claim of $669,552.30. He accordingly cancelled the gurantee. Being dissatisfied with the decision of the learned judge, the appellants appealed to the Court of Appeal.

Held, allowing the appeal: (1) the appellants were entitled to security in respect of $169,552.30 (being the balance of $669,552.30 less $500,000.00 which was not payable at the time of issue of the writ) plus interest and costs;